United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

NO. 76-4083

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

W. J. USERY, JR., Secretary of Labor,

Petitioner,

v.

MARQUETTE CEMENT MANUFACTURING CO.,

and

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE COMMISSION

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QUESTION PRESENTED

Whether the Commission properly vacated the Secretary's citation.

STATEMENT OF THE CASE

This case is before the Court pursuant to section 11(b) (29 U.S.C. 660(b)) of the Occupational Safety and Health

Act of 1970, 29 U.S.C. 651 et seq., on a petition filed by the Secretary of Labor to review an order of the Occupational Safety and Health Review Commission, issued pursuant to section 10(c) (29 U.S.C. 659(c)) of the Act. The Commission's order issued January 27, 1976 (A. 68-71),[1/] vacated a citation issued by the Secretary to Marquette Cement Manufacturing Co., charging that Marquette committed a serious violation of section 5(a)(1) (29 U.S.C. 654(a)(1)) of the Act. The alleged violation occurred in Catskill, New York, within this judicial circuit. No jurisdictional question is presented.

A. The Facts

The facts are undisputed. The only evidentiary record in the case consists of a stipulation entered into between Marquette and the Secretary (A. 15-19).

Marquette is a corporation engaged principally in the manufacture of cement. On August 19, 1973, Marquette was demolishing and reconstructing a kiln in the Kiln Building at its plant in Catskill, New York (A. 16). The kiln is lined with bricks, which, because of the high temperatures involved in the production process (ranging up to 2800 degrees Fahrenheit), must be replaced periodically (A. 16-17). The relining is done at least four times per year, and requires, on the average, five days to complete (A. 17).

1/ "A." references are to the Joint Appendix filed with the Secretary's brief.

Debris from the kiln demolition is disposed of through a chute from the Kiln Building through which the used material falls 26 feet to an alleyway which separates Marquette's Kiln Building from its Crane Storage Building (A. 17).

While Marquette did not provide any protection to employees working near the alleyway, such as danger signs to barricades, or an enclosed chute, the record fails to establish that any of Marquette's employees were assigned to work where they reasonably could be expected to be exposed to falling debris at the time the debris was being dumped (A. 17).

On August 19, 1973, one of Marquette's employees, for reasons unexplained, was in the alleyway separating the Kiln Building from the Crane Storage Building. He was struck by a large quantity of debris dumped from the interior of the Kiln Building and was fatally injured (A. 17). The deceased employee had been employed by Marquette for 27 years at the time of his death (A. 18). There is no explanation for the employee's presence in the alleyway, as at the time of the accident, he was assigned to work inside the Kiln Building, and his presence outside the Kiln Building was totally unexplained by the record (A. 18).

Following the accident, the Secretary conducted an investigation and as a result cited Marquette for serious

violation of section 5(a)(1) of the Act (A. 1-2, 18).[2/]

Specifically, the citation alleged (A. 2):

> The employer failed to furnish to each of his employees working near the passageway between the kiln building and the cran storage building a place of employment which is free from recognized hazards that were causing or likely to cause death or serious physical harm to his employees in that the employer did not provide suitable means to protect employees from the hazards created by falling bricks, such as; providing danger signs to alert employees that an immediate hazard existed from falling bricks; providing barricades to deter and prevent employees from entering the brick dumping area; providing an enclosed chute for the dumping of bricks from a 26-foot level; or providing other suitable means of preventing employee exposure to falling bricks.

Marquette timely contested the citation (A. 40), and thereafter the Secretary filed a formal complaint with the Commission (A. 5-10). The Secretary's complaint, pursuant to Commission Rule 33(a) (29 C.F.R. 2200.33(a)), amended the citation to allege a violation of section 5(a)(2) of the Act,[3/] rather than section 5(a)(1), the violation charged

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2/ Section 5(a)(1) provides:

> Each employer—
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

3/ Section 5(a)(2) provides:

> (2) shall comply with occupational safety and health standards promulgated under this Act.

in the citation. The complaint alleged that Marquette violated an Occupational Safety and Health Standard published at 29 C.F.R. 1926.852(a).[4/] Part 1926 standards are applicable only to construction work. 29 C.F.R. 1926.12. Thereafter, Marquette and the Secretary entered into a brief stipulation of facts, which is substantially recounted above, and further stipulated to limit the issues (A. 18-19) (emphasis added):

> Wherefore, based upon the above Stipulation of Facts, the parties hereto certify that only the following two questions remain to be decided in this proceeding:
>
> 1. Was Respondent properly cited for a serious violation of 29 C.F.R. 1926.852(a)?
>
> 2. If Respondent was properly cited should the proposed penalty of $600.00 be affirmed?
>
> Furthermore, the parties consent to a determination of the above questions by the Court [i.e., the Commission] based upon the above Stipulation.

Despite the foregoing stipulation, which specifically limited the issues to be tried, in his brief to the Administrative Law Judge, the Secretary again sought to amend his citation to reallege a violation of section 5(a)(1) (A. 26-29). The ALJ permitted the amendment; however, he concluded that no section 5(a)(1) violation

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4/ 29 C.F.R. 1926.852(a) provides:

> No material shall be dropped to any point lying outside the exterior walls of the structure unless the area is effectively protected.

had been established by the Secretary's evidence (A. 39; 41-43). The ALJ reasoned (A. 42-43):

> There is no evidence in this record that [Marquette's] method of discarding the used brick taken from the kiln under repair, was causing or was likely to cause death or serious physical harm to any employee engaged in employment activity. The Stipulation establishes that the employee accidentally killed on August 19, 1973, was an employee of 27 years experience with Respondent. Further, on this date, "* * * he was assigned to perform maintenance work inside the Kiln Building and no witnesses are available to testify to any circumstances which explain his presence outside the Kiln Building." (Para. 11, Stipulation of Facts).
>
> Paragraph 6 of this Stipulation describes the area between the Kiln Building and Crane Storage Building as an alleyway.
>
> In short, there is no evidence to support the conclusion that this area was used by Respondent's employees as a passageway, nor as an area within which any work was to be performed. The contrary inference is possible, although not necessary, by denominating the area an "alleyway". The record is simply devoid of any evidence to establish any reason for any employee to be in the area.
>
> It is therefore concluded the Complainant has not sustained the requisite burden of establishing that a condition existing at this worksite was causing or likely to cause any employee serious physical harm, or that Respondent knew or reasonably could have known that this condition could result in serious physical harm to any of its employees.

> There is insufficient evidence in this record to support a violation of Section 5(a)(1) of the Act.

Accordingly, the ALJ ordered the Secretary's citation and proposed penalty vacated (A. 44).

B. The Commission's Decision and Order

The Commission affirmed the ALJ's vacation of the citation and proposed penalty. In affirming, the Commission did not adopt the ALJ's conclusion that the Secretary properly could amend the citation to again allege a section 5(a)(1) violation. Thus, while the Commission recognized the applicability of Rule 15(b) of the Federal Rules of Civil Procedure (A. 69), it found the amendment improper in this case, because (A. 70-71):

> Here, the parties stipulated to the facts. At that time the only pending charge was the alleged noncompliance with § 1926.852(a). The first indication of the amendment occurred thereafter - in complainant's brief to the Judge. Allowing an amendment at this late stage of the proceeding not only implies consent by the respondent when there has been none, but could prejudice the respondent by not allowing it an opportunity to introduce rebuttal evidence on elements of a § 654(a)(1) violation which are not part of a § 654(a)(2) charge, such as whether the alleged violative condition constituted a recognized hazard.

Though it concluded that the ALJ erred by allowing the amendment, the Commission agreed with the ALJ's findings that the evidence failed to establish a section 5(a)(1) violation. The Commission concluded that the ALJ's error was not prejudicial, and accordingly affirmed his disposition "on the merits" (A. 71).

ARGUMENT

THE COMMISSION PROPERLY VACATED THE SECRETARY'S CITATION.

1. Section 8(a) of the Act (29 U.S.C. 657(a)) authorizes the Secretary to conduct inspections and investigations of employers' premises and worksites to determine compliance with the Act. Section 9(a) (29 U.S.C. 658(a)) authorizes the Secretary to issue citations for alleged violations. Citations may be bottomed either on section 5(a)(1) of the Act -- the General Duty Clause -- which requires employers to furnish employment free from recognized hazards capable of causing death or serious physical harm to his employees, or may be based on section 5(a)(2), which requires employers to comply with Occupational Safety and Health Standards duly promulgated by the Secretary under section 6 of the Act (29 U.S.C. 655).

Because Congress placed primary emphasis on achieving safe and healthful employment conditions through specific standards, the Secretary may not sustain a citation alleging a violation of the General Duty Clause if there is a validly promulgated Occupational Safety and Health Standard which applies. American Smelting & R. Co. v. OSHRC, 501 F.2d 504, 512 (C.A. 8, 1974); Brisk Waterproofing Co., Inc., Occ. S. & H. Dec. (CCH), para. 16,345 (1973), citing S. Rept. No. 91-1282, 91st Cong. 2nd Sess. (1970) at 9-10; Advance Air Conditioning Co., Inc., Occ. S. & H. Dec. (CCH), para. 17,585 (1974); Sun Shipbuilding and Drydock Co., Occ. S. & H. Dec. (CCH), para. 16,725 (1973).

2. There is a clear difference in the Secretary's burden of proof to establish by a preponderance of the evidence (See Olin Const. Co., Inc. v. OSHRC, 525 F.2d 464, 465-466 (C.A. 2, 1975)) a violation of section 5(a)(1) of the Act (the "General Duty Clause") from his burden of proving a violation of section 5(a)(2) -- that a particular Occupational Safety and Health Standard has been violated. To establish a violation of section 5(a)(2), all the Secretary need prove is the standard, its applicability to the operation involved, and that the requirements of the standard have not been complied with. On the other hand to sustain a citation for violation of section 5(a)(1) -- the General Duty Clause -- the Secretary must show by a preponderance of the evidence (1) that there was a hazard; (2) that the hazard was "recognized";[5/] that the "recognized hazard" was "causing or likely to cause death or serious physical harm" to the employees of the cited employer; and that the employer had failed to take proper steps to render the workplace "free" of the hazard. See National Rlty. & C. Co. v. OSHRC, 489 F.2d 1257, 1265-1268 (C.A.D.C., 1973). And, the Secretary, having the burden of proof, must plead and prove his own theory of the case, because "[a]n employer is unfairly deprived of an opportunity to cross-examine or to present rebuttal evidence and testimony

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5/ A recognized hazard is a preventable hazard an employer has an obligation to know, or one of which he in fact knows. See Brennan v. OSHRC and Vy Lactos Laboratories, 494 F.2d 460 (C.A. 8, 1974).

when it learns the exact nature of its alleged violation only after the hearing." Id. at 1267.

3. As shown in the Statement, supra, in this case, the Secretary entered into a stipulation with Marquette on the express understanding that the case would be submitted for decision on only two issues. The stipulation provides (A. 18-19) (emphasis added):

> [T]he parties hereto certify that only the following two questions remain to be decided in this proceeding:
>
> 1. Was Respondent [Marquette] properly cited for a serious violation of 29 C.F.R. 1926.852(a)?
>
> 2. If Respondent was properly cited, should the proposed penalty of $600.00 be affirmed?
>
> Furthermore, the parties consent to a determination of the above questions by the Court [i.e., the Commission] based upon the above Stipulation.

This stipulation clearly limited the issues in dispute between the Secretary and Marquette and had the same effect as a pre-trial order limiting the issues. So far as the merits of the alleged violation were concerned, the sole dispute was whether Marquette was engaged in construction activity when relining its kiln,[6/] since 29 C.F.R. Part 1926 standards apply only to construction activity. See 29 C.F.R.

6/ This contention has been abandoned by the Secretary. As noted, supra, p. 8, the Secretary may not cite for a violation of section 5(a)(1) -- the General Duty Clause -- if there is a valid Occupational Safety and Health Standard which applies.

1926.12; A. 14; Marquette's Brief to the ALJ, pp. 4-7 (Addendum "A"); Secretary of Labor's Memorandum of Law (Addendum "B") at pp. 3b-9b).

Because of the stipulation, the applicability of Rule 15(b) of the Federal Rules of Civil Procedure,[7/] relating to amendments to conform to the evidence -- trial by consent -- is severly limited. "When a pre-trial order or stipulation is involved Rule 15(b), concerning amendments to conform to the evidence, must be read in conjunction with Rule 16." Kline v. S. M. Flickinger Co., 314 F.2d 464, 467 (C.A. 3, 1963). Rule 15(b) "is applicable only where it clearly appears from the record that an issue not raised in the pleadings and not preserved in the pre-trial order has in fact been tried and that this procedure has been authorized by express or implied consent of the parties." Systems, Incorporated v. Bridge Electronics Company, 335 F.2d 465, 466-467 (C.A. 3, 1964). To like effect, see Monod v. Futura, Inc., 415 F.2d 1170, 1173-1174 (C.A. 10, 1969).

Here, the Secretary entered into a stipulation limiting the issues for consideration, and Marquette stipulated the facts on that express understanding. In these circumstances, the Secretary

> must be held to the position [he] freely adopted prior to trial. If [he] had cause for relief [he] should have moved

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7/ Since the Commission has adopted no rule of procedure different from Rule 15(b), that Rule is applicable to Commission proceedings. 29 U.S.C. 661(f).

> to amend thereby warning [Marquette], who otherwise was entitled to suppose that [Section 5(a)(1) was not at issue]. The spirit of flexibility behind the Rules is not intended to permit one of the parties to be booby-trapped. [The Secretary should] remain bound by [his] * * * stipulation unless the [Commission] is * * * persuaded for good cause shown that [he] should be relieved.

Romero Reyes v. Marine Enterprises, Inc., 494 F.2d 866, 868-869 (C.A. 1, 1974). "For this reason a pre-trial order [or equivalent stipulation] is generally binding on the parties [and] cannot be modified without * * * a showing of manifest injustice." Ely v. Reading Co., 424 F.2d 758, 763 (C.A. 3, 1970). As this Court stated in Mull v. Ford Motor Company, 368 F.2d 713, 716 (1966):

> It is a primary purpose of pre-trial stipulations, and pre-trial procedures in general, to simplify the issues of fact and to eliminate those not relied upon. Carefully drawn and negotiated stipulations avoid confusion, and save time and expense for the parties, as well as for the courts. Because of this, stipulations ought to be binding, not only to do justice between the parties but to encourage their effective use.

Furthermore,

> [t]he decision of whether or not to permit a change is within the discretion of the [Commission]. Appellate interference with this discretion should be kept at a minimum. It should only be exercised where there is a clear abuse of discretion.

Ely v. Reading Co., supra, 424 F.2d at 763-764 (footnotes omitted).[8/]

4. In this case, the Commission's discretion not to permit the sought amendment was not only properly exercised, it was mandated by considerations of fairness. As the Commission noted, the facts in this case were stipulated, and they were stipulated "[a]t the time the only pending charge was the alleged noncompliance with a [specific standard and violation of section 5(a)(2) of the Act]" (A. 70). To allow an amendment after the facts had been stipulated on the basis of a charge of a section 5(a)(2) violation at the stage of the proceeding when it was no longer possible for Marquette to introduce additional evidence -- in the Secretary's brief to the ALJ -- "implies consent by [Marquette] when there has been none" (A. 70-71).[9/] Furthermore, Marquette

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8/ Of course, in administrative proceedings, it is the Commission itself, rather than the Administrative Law Judge, which stands in the role of the trial judge. It is the Commission's order that is under review by this Court, and it is the propriety of the Commission's exercise of discretion that must be considered. See Accu-Namics v. OSHRC, 515 F.2d 828, 834-835 (C.A. 5, 1975), cert. den., March 29, 1976, No. 75-878; Brennan v. OSHRC and Hanovia Lamp Div., 502 F.2d 946, 953 (C.A. 3, 1974).

9/ Throughout the proceedings which followed the stipulation, Marquette objected to an amendment to reallege a violation of the General Duty Clause. That cannot be called a trial of that issue by consent. Marquette's brief to the ALJ states at pp. 7-8 (Addendum "A"):

> The dismissal of the amended citation on the ground of the inapplicability of the standard specified does not revive the originally asserted grounds charging a violation of the "general

(footnote continued on next page)

could be prejudiced by allowing the amendment at the late stage of the proceeding, because it was not allowed "an

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9/ (continued

> duty" standard. The amendment of a citation by way of a complaint to allege the violation of a standard different from that originally cited constitutes an abandonment of the originally cited standard. Mesa Fiber Glass Products Company, OSHRC Docket No. 1645 (Judge J.P. Brenton, 1973), CCH Employment Safety and Health, ¶15,810. Additional support for this conclusion can be found in the very wording of the Secretary of Labor's Complaint. Paragraph VI of the Complaint provides that:
>
> > "Item 1 of the citation has been amended by paragraph V of this complaint to allege a serious violation of 29 CFR 1926.852(a) in place of the serious violation of section 5(a)(1) of the Act . . ." (Emphasis added.)
>
> In short, the Complaint itself recites the abandonment of the "general duty" standard allegations.
>
> Having abandoned the "general duty" standard, the Secretary of Labor cannot now be allowed to return to that standard following a dismissal of the amended citation on the ground of inapplicability of the standard cited. To allow the Secretary of Labor to return to the originally cited grounds following dismissal of the amended citation is tantamount to allowing alteration of the basis of his charge after the evidence has been presented on the basis of the amended citation. In short, allowing the Secretary of Labor to return to the original ground would constitute deprivation of due process which the judge found to be proscribed by the Act in Reserve Roofing and Sheet Metal, Inc., OSHRC Dockete No. 1796 (Judge C. K. Chaplin, 1973), CCH Employment Safety and Health, ¶ 16,353.

See also Marquette's brief to the Commission (A. 52-54).

(footnote continued on next page)

opportunity to introduce rebuttal evidence on elements of a § 654(a)(1) violation which are not part of a § 654(a)(2) charge" (A. 72).[10/] Thus, even assuming, arguendo, that the stipulated facts make out a prima facie case for a section 5(a)(1) General Duty Clause violation, an assumption rejected by the Commission,[11/] Marquette might well have had affirmative defenses or rebuttal evidence, such

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9/ (continued)

Nor can the caution of its attorney in arguing that in any event no General Duty violation was proven by the stipulated facts be construed as consent to adjudication on the question of a section 5(a)(1) violation. To hold that Marquette's alternative argument -- an "[a]ssuming arguendo" argument -- constitutes consent clearly is at odds with elemental notions of justice and fair play. See Marquette's brief to the ALJ, pp. 8-9.

10/ Compare National Rlty. & C. Co. v. OSHRC, supra, 489 F.2d at 1267:

> An employer is unfairly deprived of an opportunity to cross-examine or to present rebuttal evidence and testimony when it learns the exact nature of its alleged violation only after the hearing.

"It is patently unfair for an agency to decide a case on a legal theory * * * which was not presented at the hearing." Id. at n. 40 (emphasis added).

11/

> [T]he Commission is presumed to have technical expertise and experience in the field of job safety. [See section 12(g) of the Act (29 U.S.C. 661(f)).] A court must therefore defer to the findings and analysis of the Commission unless such findings are without substantial basis in fact.

Brennan v. OSHRC and Republic Creosoting Co., 501 F.2d 1196, 1198 (C.A. 7, 1974). To like effect see Brennan v. OSHRC and Hanovia Lamp Div., 502 F.2d 946, 950-951 (C.A. 3, 1974). See also, National Rlty. & C. Co. v. OSHRC, supra, 489 F.2d at 1268.

as that the conduct charged to be violative was not a recognized hazard because the areas into which the bricks were dumped were not areas into which employees could be expected to go. In addition, Marquette might have shown that employees were given particular instructions relating to their safety at the time bricks were to be dumped, or that other precautions were taken. Such evidence was not relevant to the charged 5(a)(2) violation, and thus Marquette had no reason to seek its inclusion in the record.[12/]

5. Finally, we note that this stipulated record fails to disclose a single injury -- not even so much as a bruise -- as a result of the practice engaged in by Marquette for many years -- engaged in at least four times a year. This stipulated record strongly suggests, because the employee who was fatally injured was assigned to work inside the building, and had been an employee of Marquette for 27 years and thus was fully familiar with its kiln repair practice, that this particular accident resulted from the idiosyncratic or reckless conduct of the employee

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12/ The Secretary is in error when he asserts that consent to try a 5(a)(1) violation can be implied because the stipulated facts also bore on that issue. Consent cannot be implied to a trial of a section 5(a)(1) violation merely because "evidence was introduced by both parties which [also] bore on [that] question." Monod v. Futura, supra, 415 F.2d at 1174. Similarly, the Secretary's contention that there was no prejudice because the means of abating either a 5(a)(1) or 5(a)(2) violation are the same is erroneous. The question is not the manner of abatement but proof of the violation. Furthermore, abatement of a 5(a)(2) violation would require compliance with the terms of the standard, whereas abatement of a 5(a)(1) violation might be accomplished in a number of ways. In this case, for example, assuming a 5(a)(1) violation, it is conceivable that specific instructions to employees or warning signals could abate the violation. See, supra; and see infra, pp. 17-19.

involved. See National Bldg. & C. Co. v. OSHRC, supra, 489 F.2d at 1266; Brennan v. OSHRC and Hanovia Lamp Div., 502 F.2d 946, 951-952 (C.A. 3, 1974); Brennan v. OSHRC and Republic Creosoting Co., 501 F.2d 1196, 1200 (C.A. 7, 1974). See also, REA Express, Inc. v. Brennan and OSHRC, 495 F.2d 822, 826 (C.A. 2, 1974).

This stipulated case contains elements remarkably similar to those present in Hanovia, supra, and Republic Creosoting, supra. In Hanovia, an experienced laboratory technician -- 21 years as opposed to the 27 years here -- was fatally injured when he set up an electrical experiment in a most unorthodox fashion. The court there rejected the Secretary's attack on the Commission's finding that the technician had not been closely enough supervised, stating (502 F.2d at 951):

> The statute imposes the duty of furnishing 'employment and a place of employment . . . free from recognized hazards . . . .' 29 U.S.C. § 654(a)(1). * * * the purpose of the Act declares it to be the congressional purpose 'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.' 29 U.S.C. § 651(b) [emphasis added by the court]. * * * [W]e do not construe the general duty clause of § 5(a)(1) as imposing strict liability for a § 17 penalty for the results of idiosyncratic, demented, or perhaps suicidal self-exposure of employees to recognized hazards.

Accordingly, the court concluded with respect to the question of the propriety of the technician's supervision (502 F.2d at 952):

> As to the degree of supervision, there is evidence that Galligher was in fact supervised by Lienhard, a competent supervisor, at least daily, and that such supervision had in the past sufficed to preserve Galligher's accident-free record and his regular compliance with industry standards for the avoidance of electrical hazards. The Secretary's expert, while suggesting closer supervision, made no showing as to the appropriateness of any more frequent supervision than daily. He did suggest that the laboratory set-up for every test be first inspected by a supervisor before being energized, but he offered no testimony as to the feasibility of such a step when periodic or routine tests are conducted by experienced technicians. Thus we conclude that the Commission's rejection of the Secretary's contention respecting closer supervision is supported by substantial evidence on the record as a whole.

In Republic Creosoting, an employee who was instructed not to go near certain trucks was injured fatally when he disobeyed those instructions. The Seventh Circuit there affirmed the vacation of the Secretary's section 5(a)(1) citation, issued on the theory that the employee had been inadequately instructed and trained, stating that "the Commission accurately recognized that training may be unnecessary for an employee who is wholly disassociated with the operation in question and who would not be foreseeably exposed to danger" (emphasis added). 501 F.2d at 1200.

Here, as in Hanovia, an employee of long experience suffered fatal injury when he acted in an unpredictable

and irrational manner. Here, as in Republic Creosoting, an employee was fatally injured when he entered an area outside the scope of his employment. Of course, unlike Republic Creosoting, the record here does not specifically show that the employees were told not to enter the alleyway. However, the employees were familiar with the process of kiln relining and knew how the bricks were disposed of. Particularly is this so with respect to an employee of 27 years who was assigned to work inside the building and whose presence in the alleyway is totally unexplained by the record.[13/]

In sum, the Commission's denial of the requested amendment was a proper exercise of its discretion. Moreover, even if this case were to be considered as tried on the General Duty Clause theory of violation, the Commission's conclusion that no violation of section 5(a)(1) was established by the stipulation is supported by substantial evidence and is entitled to respect here.

13/ The Secretary's argument based on res ipsa loquitur and common law negligence is totally irrelevant.

CONCLUSION

For the foregoing reasons, the Commission's decision should be affirmed.[14/]

Respectfully submitted,

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14/ If the Secretary is concerned with an ongoing hazard to Marquette's employees, he is, of course, free to reinspect and charge a violation of the General Duty Clause which can be fairly and fully tried. Neither employee safety nor the public interest mandate any necessity that employers be "booby-trapped" (Romero Reyes v. Marine Enterprises, Inc., supra, 494 F.2d at 868) by the Secretary when he cannot decide what violation to charge and procures a stipulation of facts based on the stipulation that he is proceeding on a particular theory and has abandoned the theory on which the citation originally was issued. Indeed, to sanction such a result is to contravene the most basic public policy of all -- "Equal Justice Under Law."

CERTIFICATE OF SERVICE

I certify that on October 26, 1976, I caused two copies of the foregoing brief to be mailed, postage prepaid to each of the following:

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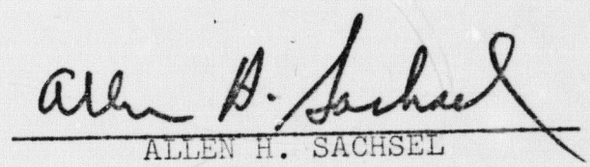

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ADDENDUM OF STATUTES AND RULES

STATUTES AND RULES INVOLVED

Section 5(a) of the Occupational Health and Safety Act of 1970 (29 U.S.C. 654(a)) provides:

> Each employer--
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> (2) shall comply with occupational safety and health standards promulgated under this Act.

Rule 15(b) of the Federal Rules of Civil Procedure provides:

> Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Rule 16 of the Federal Rules of Civil Procedure provides:

> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;
>
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
>
> (6) Such other matters as may aid in the disposition of the action.
>
> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

ADDENDUM "A"

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR	)	
v.	)	
MARQUETTE CEMENT MANUFACTURING COMPANY,	)	OSHRC DOCKET
Respondent,	)	NO. 4725
UNITED CEMENT, LIME AND GYPSUM WORKERS, LOCAL NO. 50,	)	
Authorized Employee Representative.	)	

STATEMENT OF THE CASE

Respondent, Marquette Cement Manufacturing Company, was cited by the Secretary of Labor's representative on September 14, 1973, for a serious violation of the "general duty" standard contained in Section 5(a) of the Occupational Safety and Health Act for allegedly not having provided suitable means to protect its employees from the hazards created by the disposal of bricks accompanying the relining of its kiln or furnace utilized in the manufacture of cement.

On September 20, 1973, the Respondent, by way of a letter to the Area Director of the Occupational Safety and Health Administration, contested the citation and proposed penalty, stating that it was contesting the citation and proposed penalty on the grounds that working conditions in the area of the affected employee complied with federal safety standards.

The Secretary of Labor, in filing a Complaint with the Occupational Safety and Health Review Commission, amended the original citation to allege a serious violation of 29 CFR 1926.852(a) " . . . in place of the serious violation of Section 5(a)(1) of the Act . . . " on the theory that the employer's relining of the kiln and the accompanying disposal of bricks constituted "demolition" within the meaning of Subpart T of Part 1926. In its Answer, the Respondent denied the applicability of 29 CFR 1926.852(a) and prayed that the citation and proposed penalty be vacated. The issue then before the Administrative Law Judge is whether the Respondent was properly cited for a serious violation of 29 CFR 1926.852(a).

STATEMENT OF FACTS

Respondent, Marquette Cement Manufacturing Company, is engaged in the manufacture of cement at various locations throughout

the United States, including its plant located in Catskill, New York, the situs of the events giving rise to the instant litigation. On or about August 29, 1973 Respondent was engaged in maintenance repairs on a kiln or furnace used in the cement manufacturing process to dry the material and to form the compounds which are elements of cement. This maintenance process involved the removal of worn portions of brick lining and its replacement with new brick. The old brick is discarded. Such maintenance is necessary a minimum of four times annually and requires a period of five days to complete on the average.

On August 29, 1973 portions of the removed brick were being discarded in a nonworking area adjacent to the building in question. Employee Frank F. Rysavy, an employee of 27 years experience was, for some unexplained reason, in the nonworking area into which the removed bricks were being discarded and was struck by a quantity of removed bricks being discarded. From the stipulated frequency of relining maintenance and the stipulated length of Mr. Rysavy's employment, it may be assumed that he experienced the same type of maintenance on at least 108 occasions (4 x 27 = 108)--thus making him a very experienced employee. Mr. Rysavy suffered injuries which resulted in his death. As the parties' Stipulation of Facts establishes, there was no evidence whatsoever to explain Mr. Rysavy's presence in the nonworking area at the time of the accident in question although it is stipulated that

his work responsibilities were inside the building and not in the area of the accident.

ARGUMENT

In amending the original citation to allege a violation of 29 CFR 1926.852(a) the Secretary of Labor now relies upon a standard which is inapplicable to the kiln relining activity. The heading or caption for Section 1910.12 of 29 CFR, Chap. XVII, Part 1910, Subpart B, the section whereby the Secretary of Labor adopted the construction standards combined in Part 1926 as occupational safety and health standards, is "Construction work". Additionally, subsection (a) thereof provides that:

> "Standards. The standards prescribed in Part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. . . ."

In short, the standards set forth in Part 1926 are limited in application to the construction industry and to activities which amount to construction work.

The Respondent is engaged not in the business of erecting, maintaining or demolishing buildings--or integral parts thereof--but rather solely in the manufacture of cement. Moreover, the relining

of the kiln or furnace with bricks does not amount to "construction work" within the meaning of Part 1926. The relining is performed not on a building or integral part thereof but rather on manufacturing equipment. Repair and/or maintenance of manufacturing equipment--as distinguished from building maintenance and repair--is not encompassed by the standards set forth in Part 1926.

Illustrative of the exclusion of the relining of a kiln or furnace with brick from coverage by the construction standards in Part 1926 is the decision by Review Commission Judge Joseph L. Chalk in Keibler Industries, Inc., OSHRC Docket No. 1689 (1973), CCH Employment Safety and Health, ¶16,234. In that case, Judge Chalk was confronted with the issue of the applicability of the construction standards contained in Part 1926 to the cleaning of a furnace utilized in the manufacture of steel. The cleaning process ". . . involved the removal of the furnace's lining of brick that burns out every three or four weeks, depending upon how many times the furnace is used." The Judge stated:

> "I have concluded that the electrical furnace in this case, not shown to have been an integral part of the building in which it was located, fits into the category of manufacturing equipment and that the work performed on it every three or four weeks, if it can be classified as repair work rather than routine maintenance, it is not the type of activity contemplated by the construction standards. Accordingly, Respondent's activities did not, as a matter of law, bring Respondent within the purview of the construction standards and the charge must fall." (Paragraph 16,234 at p. 21,190.)

This decision became the final order of the Occupational Safety and Health Commission; no commissioner directed review within thirty days of the decision.

The Secretary of Labor has not introduced a scintilla of evidence demonstrating that the kiln or furnace in the instant case is an integral part of a building. The facts, as stipulated, demonstrate that the kiln is solely manufacturing equipment. Accordingly, the relining of the kiln with brick and the disposal of the old brick, does not amount to construction work within the meaning of Part 1926 and, as a result, the charge alleging a violation of Section 1926.852(a) must fall.[1/]

1/ Additional grounds for holding that the cited standard, 29 CFR 1926.852(a) is inapplicable is that the subpart in which this standard is set forth--namely, "Subpart T-Demolition"--cannot, by its terms, reasonably be construed to encompass the kiln relining activity. The term "demolish" is defined in Webster's Third New International Dictionary (Unabridged) (1966 Edition) as:

> "....to pull or tear down (as a building)....raze; to break to pieces or apart usually with force or violence; ruin completely; shatter, smash ...." (at page 600).

The intended scope of the standards contained in Subpart T, as evidenced by the terminology employed--e.g., surveying the frame, floors, walls ...removal of floors, walls, etc.--is to reach activities whereby a structure is razed. In the instant case, the kiln was not razed. The process of relining the kiln or furnace was limited solely to the removal of an inner layer of brick and its replacement with new brick. In short, the relining activity cannot reasonably be viewed as constituting "demolition" as that term is explicitly used in Subpart T, and, as a result, the cited standard is demonstrably inapplicable. See, for example, Basic Rock Products, OSHRC Docket No. 1477 (Judge R. N. Burchmore, 1973), CCH Employment Safety and Health, ¶15,521.

The Citation, amended by the Secretary of Labor's Complaint to allege a violation of an inapplicable standard, must be dismissed. The legal consequence of citing an inapplicable standard is the dismissal of the citation. See, for example, Basic Rock Products, supra; J. F. Probst & Co., Inc., OSHRC Docket No. 963 (Judge L. F. Rubin, 1973), CCH Employment Safety and Health, ¶15,481; Austin Company, Inc., OSHRC Docket No. 899 (Judge A. K. Wienman, 1973), CCH Employment Safety and Health, ¶15,463.

The dismissal of the amended citation on the ground of the inapplicability of the standard specified does not revive the originally asserted grounds charging a violation of the "general duty" standard. The amendment of a citation by way of a complaint to allege the violation of a standard different from that originally cited constitutes an abandonment of the originally cited standard. Mesa Fiber Glass Products Company, OSHRC Docket No. 1645 (Judge J. P. Brenton, 1973), CCH Employment Safety and Health, ¶15,810. Additional support for this conclusion can be found in the very wording of the Secretary of Labor's Complaint. Paragraph VI of the Complaint provides that:

> "Item 1 of the citation has been amended by paragraph V of this complaint to allege a serious violation of 29 CFR 1926.852(a) in place of the serious violation of section 5(a)(1) of the Act..." (Emphasis added.)

In short, the Complaint itself recites the abandonment of the "general duty" standard allegations.

Having abandoned the "general duty" standard, the Secretary of Labor cannot now be allowed to return to that standard following a dismissal of the amended citation on the ground of inapplicability of the standard cited. To allow the Secretary of Labor to return to the originally cited grounds following dismissal of the amended citation is tantamount to allowing alteration of the basis of his charge after the evidence has been presented on the basis of the amended citation. In short, allowing the Secretary of Labor to return to the original ground would constitute deprivation of due process which the judge found to be proscribed by the Act in Reserve Roofing and Sheet Metal, Inc., OSHRC Docket No. 1736 (Judge C. K. Chaplin, 1973), CCH Employment Safety and Health, ¶16,353.

Assuming arguendo that the dismissal of the amended citation on the grounds of the inapplicability of 29 CFR 1926.852(a) operates to revive the original charge of a violation of the "general duty" standard, the Secretary of Labor has failed to meet his burden of proof establishing the "general duty" violation. To sustain a charge of a serious violation of the "general duty" standard, the Secretary must prove that the employer knew or should have known of the existence of the hazard. George Nelson Roberts, Jr., OSHRC Docket No. 98 (Judge D. G. Oringer, 1973), CCH Employment Safety and Health, ¶15,065. The Secretary of Labor offered no evidence whatsoever that the Respondent knew or should have known that the manner in which the removed brick was discarded

constituted a hazard to its employees. To the contrary, the evidence reveals that there is no explainable reason for the presence of Mr. Rysavy in the area in question. Similarly, the record is devoid of any evidence whatsoever that any employee has cause to be in the area. In short, there is no evidence whatsoever that the Respondent should have recognized the activity in question as hazardous to its employees.

CONCLUSION

For the reasons stated, and upon the record as a whole, the Respondent respectfully requests that the citation and proposed penalty be vacated.

Respectfully submitted,

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ADDENDUM "B"

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR :
UNITED STATES DEPARTMENT OF LABOR

v. OSHRC Docket

MARQUETTE CEMENT MANUFACTURING CO. : NO. 4725

Respondent,

UNITED CEMENT, LIME AND GYPSUM WORKERS, LOCAL NO. 50 :

Authorized Employee Representative. :

SECRETARY OF LABOR"S
MEMORANDUM OF LAW

STATEMENT OF THE CASE

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (hereinafter referred to as "the Act") to review a citation issued by the Secretary of Labor pursuant to section 9(a) and a proposed assessment of penalty thereon issued pursuant to section 10(a) of the Act.

The citation issued on September 14, 1973 alleges that Marquette Cement Manufacturing Company, the employer (hereinafter referred to as the "respondent") violated secttion 5(a)(1) of the Occupational Safety and Health Act in that "the employer failed to furnish each of his employees working near the passageway between the Kiln Building and the Crane Storage Building a place of employment which is free from recognized hazards that were causing or likely to cause death or serious physical harm to his employees in that the employer did not provide suitable means to protect employees from the hazards created by falling bricks, such as;

providing danger signs to alert employees that an immediate hazard exists from falling bricks; providing barricades to deter and prevent employees from entering the brick dumping area; providing an enclosed chute for the dumping of bricks from a 26 foot level; or providing other suitable means of preventing employee exposure to falling bricks".

The complaint filed on October 15, 1973 amended the citation pursuant to Occupational Safety and Health Review Commission Rule 33(a)(3), (29 C.F.R. 2200.33(a)(3)). The complaint alleged in paragraph V:

> "On August 29, 1973, respondent violated section 5(a)(2) of the Act and the Occupational Safety and Health Standard found at 29 C.F.R. 1926.852(a) promulgated pursuant to section 6 of the Act at its workplace located at Route 9W, Catskill, New York in that respondent failed to insure that no material shall be dropped to any point lying out side the exterior walls of the structure unless the area is effectively protected. While respondent was engaged in the demolition and reconstruction of a brick kiln in the kiln building it subjected its employees working near the passageway between the kiln building and the crane storage building to the hazards created by falling bricks. On August 29, 1973, employee Frank F. Rysavy was fatally injured by debris, including brick removed from the kiln, dumped out of an unprotected chute from the interior of the building.

The Occupational Safety and Health Standard allegedly violated was described in the complaint as serious. The subject standard is set forth as follows:

> 29 C.F.R. 1926.852 chutes. (a) no material shall be dropped from any point outside the exterior walls of the structure unless the area is effectively protected.

A notification of proposed penatly was issued by the complainant on September 14, 1973 proposing a penalty of $600.00 for the alleged serious violation described above. In a letter dated September 20, 1973, the respondent

filed a notice of intention to contest the alleged serious citation and proposed penalty therefore. This cause was referred to the Occupational Safety and Health Review Commission for hearing pursuant to Section 10(c) of the Act.

Attorneys for the parties entered into a stipulation of facts dated March 13, 1974 wherein the parties certified that the following two questions remained to be decided in this proceeding:

1) was respondent properly cited for a serious violation of 29 C.F.R. 1926.852(a)?

2) if respondent was properly cited, should the proposed penalty of $600. be affirmed?

The stipulation of facts is annexed hereto as Exhibit A.

DISCUSSION

1. RESPONDENTS ACTIVITIES IN THE DEMOLITION AND RECONSTRUCTION OF ITS KILN ARE WITHIN THE AMBIT OF THE SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

The stipulated facts clearly establish respondent's engagement in demolition operations. Respondent's quarterly shutdown of the kiln for the removal of worn bricks and the relining with new bricks is within the contemplation of subpart T of the Occupational Safety and Health Administration Safety Construction Standards (29 C.F.R. 1926). Although respondent is engaged principally in manufacturing cement, the demolition and reconstruction of a kiln at its Catskill

New York plant is within the definition of construction work found at 29 C.F.R. 1910.12(b). This regulation states "for purposes of this section, 'construction work', means work for construction alteration and/or repair, including painting and decorating". Respondent's activities certainly constituted alteration and repair of the Kiln. In Pacific Gas Electric Co., A Corp., OSHRC Docket No. 2821, Judge Burchmore rejected an argument of the employer that its men were engaged in maintenance work and the cited regulation applied only to construction. The Judge ruled that the broad category of "repair", in 29 C.F.R. 1910.12(b) includes maintenance work. The stipulated facts in the present case also indicate that deceased employee Frank F. Pysavy was engaged in maintenance work and the employer was likewise engaged in maintenance or repair work within the contemplation of 29 C.F.R. 1910.12(b).

The question of whether an employer is engaged in construction activities has also been litigated under the Fair Labor Standards Act (29 U.S.C. 201, et seq.). Section 203(s)(3) of that Act defines an "enterprise engaged in commerce or in the production of goods for commerce" to include those engaged in the "business of construction or reconstruction or both." Such an enterprise must comply with all provisions of the Act. A case under that Act, Wirtz v. Allen Green Associates, Inc., 379 F. 2d

198 (C.A. 6, 1967), involved the construction of motel and apartment facilities for the private account of the company doing the construction work. Rejecting the employers argument that since this construction resulted in no profits or receipts to the employer its activities did not constitute a covered enterprise, the court held:

> "The underlying concern of the Act is the impact of the particular activities upon interstate commerce. From this perspective the ultimate disposition of the construction has little relevance. The important consideration is whether the activity which went into the actual building process is likely to have an effect on the flow of men, money and materials across state lines. . . . The fact that the contractor does not sell the building after its completion does not mean that in constructing it for his own purposes he did not set in motion substantial interstate commercial activities. . . [379 F. 2d at 199-200].

Likewise in Hodgson v. Colonnades, Inc., etc. et al. 472 F. 2d 42 (C.A. 5, 1973) the court held that the overtime pay exemption available to hotels did not extend to construction workers employed by a hotel to make capital outside improvements.

On this point see Shultz v. Cove Plumbing Co., 60 CCH Lab. Cas. ¶32,173, 18 WH cases 869, (W.D. Tex. 1969) where the court noted that the Act does not require that a construction enterprise be exclusively, or even primarily, engaged in the business of construction or reconstruction. See also Shultz v. W. R. Martin & Son., Inc., 428 F. 2d 186 (C.A. 4, 1970).

As in the above cases, Marquette Cement Manufacturing Company, although primarily engaged in the manufacture of cement, from time to time engaged in work of construction alteration or repair when it became necessary to demolish and reconstruct the kiln utilized in the cement manufacturing process. A holding to the contrary would ignore the proposition enunciated by the United States Supreme Court in a Fair Labor Standards Act case, Mitchell v. Lublin, McGaugay and Associates, 358 U.S. 207, 211 79 S. Ct. 260, 264 (1959), but equally applicable here, "within the tests of coverage fashioned by Congress, the Act has been construed liberally to apply to the furthest reaches consistent with Congressional direction" As the enumerated purposes of the Occupational Safety and Health Act clearly state at section 2(b) "The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several states and with foreign nations and to provide for the general welfare to assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources . . ." This broad statement of purpose compels the Occupational Safety and Health Review Commission and the courts to liberally construe the Act and the Secretary of Labor's standards promulgated pursuant to the Act.

II RESPONDENT VIOLATED OCCUPATIONAL SAFETY AND HEALTH STANDARD 29 C.F.R. 1926.852(a)

During the course of respondent's demolition and reconstruction of its brick kiln, respondent disposed of debris resulting from the demolition by dropping the material outside the exterior wall into the alleyway between the kiln building and the crane storage building. The material was dropped from an unprotected chute approximately 26 feet in an almost direct vertical drop. Protective devices within the contemplation of the demolition standards, such as danger signs warning of the hazard of falling material, 29 C.F.R. 1926.850(b), the closing off of the area surrounding the discharge end of the chute, 29 C.F.R. 1926.852(d) barricades or enclosure of the chute, 29 C.F.R. 1926.852(b), were not provided . The respondent therefore clearly violated 29 C.F.R. 1926.852(a) which provides "chutes, (a) no material shall be dropped to any point lying outside the exterior walls of the structure unless the area is effectively protected".

Subpart G of the Occupational Safety and Health Administration Construction Standards also warned respondent of the means to be employed to avoid a safety hazard from the demolition and waste disposal operation. 29 C.F.R. 1926.200(b) states that danger signs shall be used only where an immediate hazard exists, as here with the dumping operation. Likewise subpart H which is concerned with

materials handling, storage, use and disposal provided in 29 C.F.R. 1926.252(a) "Disposal of waste materials. (a) Whenever materials are dropped more than 20 feet to any point lying outside the exterior walls of the building, an enclosed chute of wood, or equivalent material shall be used. For the purpose of this paragraph, an enclosed chute is a slide, closed in on all sides, through which material is moved from a high place to a lower one". Respondent utterly failed to comply with any of these generally recognized principles of waste material disposal and chute construction incorporated in the Occupational Safety and Health Standards. This failure to provide protection resulted in an accident which caused the death of respondent's maintenance employee, Frank F. Rysavy at approximately 8:45 p.m. on August 29, 1973. While Mr. Rysavy was in the alleyway separating the kiln building and the crane storage building he was struck by a large quanitty of debris dumped from the aforementioned chute. Mr. Rysavy was killed immediately as a result of a crushed skull caused by the falling bricks. Respondent admits that it was aware of the condition of the unprotected chute. In view of the employers knowledge of the condition, the nature of the hazard and its potential to cause death or serious physical injury in the event of an accident the Secretary justifiably issued a citation for a serious violation to the respondent. The addendum attached to the stipulation and filed on April 5, 1974 shows that the Secretary gave due consideration to the size of the business of the

respondent, the gravity of the violation, the good faith of the employer and the history of previous violations in proposing a penalty of $600 as required under section 17(j) of the Act.

III THE SECRETARY SHOULD BE PERMITTED TO AMEND HIS PLEADINGS TO CONFORM TO THE EVIDENCE PURSUANT TO F.R.C.P. RULE 15

Pursuant to Commission rule 33(a)(3) the Secretary moved at the time he served his complaint to amend the allegation of a section 5(a)(1) violation to an allegation of a violation of a specific standard, 29 C.F.R. 1926.852(a). Assuming arquendo that 29 C.F.R. 1926.652(a) is found inapplicable to the facts of the instant citation, the Secretary should be permitted to amend his pleadings, pursuant to F.R.C.P. 15(b) to conform them to the proof. Indisputably the facts stipulated in this case make out a cause of action under the Act's so called "general duty clause". The various Occupational Safety and Health Standards cited above make it clear that the respondent failed to furnish to each of his employees employment and a place of employment which are causing or are likely to cause death or serious physical harm to his employee. Use of an unprotected chute is certainly a recognized hazard as shown by the industry experience crystallized into 29 C.F.R. 1926.252(a) and 29 C.F.R. 1926.852(a).

The Review Commission in Brisk Waterproofing Co., Inc. OSHRC Docket No. 1046, allowed the Secretary to amend the violation from a section 5(a)(1) to a violation of a standard after the Judge filed his decision. The Commission relied on rule 15 of the Federal Rules of Civil Procedure and stated:

This rule was intended to promote decisions on the merits of issues and not upon the pleadings.

After the Review Commission adopted a liberal view toward pleading in the Irish Waterproofing case, Judge Chaplin held as a conclusion of law in General Electric Co., OSHRC Docket No. 2739:

> The citation may be amended at any stage of the proceeding prior to the decision if the respondent is afforded due process.

In the General Electric case the Secretary moved to amend, in one instance to a more applicable standard, and in another he moved to amend from a standard to section 5(a)(1) at the hearing. The Judge allowed the amendments with the following reasoning:

> The purpose of the Act cannot be served by permitting the actions of the Secretary's agents to defeat the achievements of safe and healthful working conditons. So long as the Respondent is on notice of the charge, permitted adequate time to cure surprise and prepare its defense and the amendment flows from the same factual situation the Judge may grant a motion to amend at any stage of the proceeding or on his own initiative amend to conform to the evidence pursuant to Rule 15 of the Federal Rules of Civil Procedure within the limitations previously expressed. (p. 46 of the decision).

In National Realty and Construction Co., 489 F. 2d 1257 (1973), the Court of Appeals, Second Circuit stated:

This follows from the familiar rule that administrative pleadings are very liberally construed 29/ and very easily amended 30/. The rule has particular pertinence here, for citations under the 1970 Act are drafted by non-legal personnel, acting with necessary dispatch. Enforcement of the Act would be crippled if the Secretary was inflexibly held to a narrow construction of citations issued by his inspectors. 31/

29/ Professor Davis states the rule with characteristic verve. The most important characteristic of pleadings in the administrative process is their unimportance. And experience shows that unimportance of pleadings is a virute. * * *

1 K Davis, Administrative Law Treatise §8.04 at 523 (1958). See also Tasker v. FPC, 141 U.S. App. D.C. 274, 437 F. 2d 707 (1970).

30/ NLRB v. Fant Milling Co., 360 U.S. 201 (1959). NLRB v. Pallette Stone Corp., 2 Cir., 283 F. 2d 641 (1960).

31/ Allowing subsequent amendment of a citation's charges will not disturb the central function of the citation, which is to alert a cited employer that it must contest the Secretary's allegation or pay the proposed fine. In the typical case, the more inaccurate or unhappily drafted is a citation, the more likely an employer will be to contest it. But a citation also serves to order an employer to correct the cited condition or practice, and a failure to so correct is a punishable violation. 29 U.S.C. §666(d). Obviously an employer cannot be penalized for failing to correct a conditon which the citation did not fairly characterize. Thus, before penalizing a failure to correct a cited violation, the Commission must satisfy itself that the citation defines the uncorrected violation with particularily. 29 U.S.C. §658 (a).

In Sun Shipbuilding and Dry Dock Company, OSHRC Docket No. 161, the Secretary cited respondent under both section 5(a)(1), the so-called general duty requirement and section 5(a)(2) for failure to comply with a more specific occupational safety and health standard. The Judge and Commission found the specific standard to be applicable and vacated th 5(a)(1) citation. However as Commissioner Cleary noted in his concurring opinion, the Secretary should not only be permitted, but should be encouraged to cite and plead in the alternative." . . . This is in accord with Rule 8(e)(2) of the Federal Rules of Civil Procedure . . . Pleading in the alternative has a long tradition in the law."

" Under this procedure, employers are assured of promptly issued specific citations. At the same time, dismissals based on deficient citations which frustrate the avowed purpose of the Act can be reduced or eliminated". See also Judge Harris' recent decisions in Elin Construction Co., OSHRC Docket No. 3486 and Old Forge Construction Co., OSHRC Docket No. 3491 which permitted liberal amendment of the pleadings.

CONCLUSION

Based upon the foregoing the Secretary's complaint should be affirmed in all respects.

Respectfully submitted,

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Solicitor of Labor

FRANCIS V. LA ROSA
Regional Solicitor

THEODORE T. GOTSCH
Attorney

U. S. Department of Labor
Attorneys for PETER J. BRENNAN
SECRETARY OF LABOR

CERTIFICATE OF SERVICE

I, CHRISTINE EDWARDS, an employee of the United States Department of Labor in the Office of the Regional Solicitor, 1515 Broadway, New York, New York certify that on the 4th day of April, 1974 I mailed postpaid by first class mail bearing Government frank two (2) copies of the attached

Secretary's of Labor Memorandum of Law

to George W. Moehlenhof, Esq. and one to United Cement, Lime and Gypsum Workers, Local 50 at the addresses stated after their names:

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